

**Letter of Findings: 04-20140254**  
**Gross Retail Tax**  
**For the Years 2010, 2011, and 2012**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

**ISSUE**

**I. Gross Retail Tax - Cylinder Rental.**

**Authority:** IC § 6-2.5-5-9; IC § 6-2.5-5-9(b); Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); [45 IAC 2.2-3-20](#); [45 IAC 2.2-4-27\(a\)](#); [45 IAC 2.2-4-27](#); Letter of Findings 04-20100103 (January 4, 2011); Revenue Ruling 2009-10ST (Sept. 4, 2009).

Taxpayer argues that it is not required to pay sales tax on the price it pays to rent non-returnable gas cylinders.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state business which operates an Indiana manufacturing facility. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit for 2010, 2011, and 2012. The audit reviewed Taxpayer's business records and tax returns. The audit resulted in the assessment of additional tax.

Taxpayer disagreed with a portion of the audit assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

**I. Gross Retail Tax - Cylinder Rental.**

**DISCUSSION**

Taxpayer uses various industrial gases in its manufacturing process. Taxpayer buys the gases from its supplier. The gases are delivered to Taxpayer's Indiana facility in tanks. The supplier charges and bills Taxpayer a separate charge to rent the tanks which contain the gases. Once Taxpayer has consumed the industrial gas, the tanks are returned to the supplier and the rental charges cease.

The audit sample "include[d] an assessment of cylinder rentals (not demurrage)." The audit found that the cylinder rentals were taxable pursuant to [45 IAC 2.2-4-27\(a\)](#). The audit stated that "the gross receipts of renting or leasing tangible personal property are taxable." The audit stated the "cylinder rentals are clearly a lease and are billed as a rental" because [45 IAC 2.2-4-27\(a\)](#) "only exempts from tax those transactions which would have been exempt in an equivalent sales transaction" and that these particular rental transactions would be taxable per . . . [45 IAC 2.2-5-8](#).

The audit cites two regulations as support for its position that the rental charges are subject to sales tax. [45 IAC 2.2-4-27](#) provides in part:

- (a) In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation [45IAC 2.2] only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.
- (b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.
- (c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax

on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.

(d) The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

(1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental or lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.

(2) Rental or lease period. For purposes of the imposition of the gross retail tax or use tax on rental or leasing transactions, each period for which a rental is payable shall be considered a complete transaction. In the case of a weekly rate, each week shall be considered a complete transaction. In the case of a continuing lease or contract, with or without a definite expiration date, where rental payments are to be made monthly or on some other periodic basis, each payment period shall be considered a completed transaction.

The audit also cites to [45 IAC 2.2-3-20](#) which provides:

All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. The use tax must be collected by the seller if he is a retail merchant described in Reg. 6-2.5-3-6(b)(010) [\[45 IAC 2.2-3-19\]](#) or if he has Departmental permission to collect the tax. If the seller is not required to collect the tax or fails to collect the tax when required to do so, the purchaser must remit the use tax directly to the Indiana Department of Revenue.

Taxpayer disagrees and states that IC § 6-2.5-5-9 provides "an exemption from sales tax for returnable containers if they are customarily returned by the buyer of the contents for reuse as containers, if the transaction constitutes selling at retail and if the returnable containers contain contents, or if the containers are transferred for the purpose of refilling."

Taxpayer relies on the statutory authority found IC § 6-2.5-5-9 (effective July 1, 2012) which provides:

(a) As used in this section, "returnable containers" means containers customarily returned by the buyer of the contents for reuse as containers.

(b) Sales of returnable containers are exempt from the state gross retail tax if the transaction constitutes selling at retail as defined in [IC 6-2.5-4-1](#) and if the returnable containers contain contents.

(c) Sales of returnable containers are exempt from the state gross retail tax if the containers are transferred empty for the purpose of refilling.

(d) Sales of wrapping material and empty containers are exempt from the state gross retail tax if the person acquiring the material or containers acquires them for use as nonreturnable packages for:

(1) selling the contents that the person adds; or

(2) shipping or delivering tangible personal property that:

(A) is owned by another person;

(B) is processed or serviced for the owner; and

(C) will be sold by that owner either in the same form or as a part of other tangible personal property produced by that owner in the owner's business of manufacturing, assembling, constructing, refining, or processing.

In addition, Taxpayer cites to Revenue Ruling 2009-10ST (Sept. 4, 2009), 20090932 Ind. Reg. 045090764NRA, "explaining the application of sales tax to the sale of carbon dioxide and the rental of carbon dioxide cylinders by an out-of-state company."

The taxpayer in Revenue Ruling 2009-10ST was an Indiana business which supplied its customers with carbon dioxide. The taxpayer "engage[d] in two transactions with its customers. First it rents [carbon dioxide Tanks and High Pressure Cylinders] and second it sells liquid and gas [carbon dioxide]."

The Revenue Ruling acknowledged [45 IAC 2.2-4-27\(c\)](#) which provides that, "In general, the gross receipts from renting or leasing tangible personal property are subject to tax." However, the Revenue Ruling stated that there was an exception to the general rule found at IC § 6-2.5-5-9. The ruling concluded as follows:

Taxpayer's leases of the [carbon dioxide] tanks and high-pressure cylinders are exempt from Indiana sales

tax, provided that charges for products are either separately stated on applicable invoices or are reasonably identifiable and capable of segregation from any non-exempt sales.

In this particular case, Taxpayer believes it falls squarely within the four-corners of the September 2009 Revenue Ruling and that it warrants the identical treatment.

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). A statute which provides a tax exemption, however is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (citing *Conklin v. Town of Cambridge City*, 58 Ind. 130, 133 (1877)).

To a certain extent, Taxpayer's argument is correct. When Taxpayer acquires a cylinder of industrial gases and is billed separately for the rental charge of the cylinder and the cost of the industrial gas contained therein, that rental charge is exempt. This finding comports with IC § 6-2.5-5-9(b) which provides: "Sales of returnable containers are exempt from the state gross retail tax if the transaction constitutes selling at retail as defined in [IC 6-2.5-4-1](#) and if the returnable containers contain contents."

If the tank is rented without the addition of contents - in this case - industrial gases, the rental of the tank falls under [45 IAC 2.2-3-20](#) and the vendor must collect rent on each periodic rental transaction.

This means that if, for example, on September 1, Taxpayer is billed \$40 for a tank and a \$100 for the industrial gas which is contained within that tank, the \$40 rental charge is not subject to tax. However, if the Taxpayer retains that same tank for a second month, and third month, and a fourth month (October, November, December) and the supplier bills Taxpayer for those subsequent three additional rental periods (\$120) the rental company must charge sales tax on these subsequent rental payments because the rental company is not selling the contents (the industrial gases) concurrently with those three later rental transactions. See Letter of Findings 04-20100103 (January 4, 2011), 20110323 Ind. Reg. 045110128NRA. (Finding that taxpayer's rental of tanks was not exempt where the invoices did not list a separate rental fee for the containers.)

### FINDING

Taxpayer's protest is sustained to the extent that tank rental fees are charged concurrently with the initial delivery of the industrial gases contained therein; those preliminary rental fees are not subject to sales tax.

*Posted: 09/24/2014 by Legislative Services Agency*  
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